No. 22216

In the

United States Court of Appeals

For the Ninth Circuit

AMERICAN SMELTING & REFINING COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition to Review and Set Aside an Order of the
National Labor Relations Board

Reply Brief of Petitioner American Smelting & Refining Company

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THE RESPONDENT'S COUNTERSTATEMENT OF THE CASE

Rule 18 of this Court provides in part that:

> "His (Respondent's) brief shall be of like character with that required of the appellant (Petitioner), except that no specification of error shall be required, *and no statement of the case, unless that presented by the appellant* (Petitioner) *is controverted.*" (Emphasis supplied)

Respondent has not pointed to any factual statement in Petitioner's opening brief which is challenged. Instead of

taking issue with the factual picture presented by Petitioner, Respondent has presented a watered-down and abbreviated "counterstatement" of the case without either challenging or agreeing with Petitioner's statement. Therefore, Petitioner submits that no purpose can be served by making any further comment concerning the Respondent's counterstatement of the case, but instead believes that it would be of greater benefit to comment directly on Respondent's argument in connection with the facts involved herein.

RESPONDENT'S ASSERTION THAT THE PHRASE "TERMS AND CONDITIONS OF EMPLOYMENT" IS TO BE APPLIED BROADLY, IN COMPLIANCE WITH CONGRESSIONAL INTENT

The Respondent, hoping to convince this Court that the subject of rental of company housing should always, under all circumstances, be a mandatory subject of collective bargaining, irrespective of the facts in any particular case, asserts that "Congress intended the phrase 'terms and conditions of employment' to be applied broadly." (Bd. Br., 8)* Respondent attempts to support this view by citing various Congressional reports and then comments that "bargaining is required with respect to numerous other subjects of employee concern beyond working hours and wages." (Bd. Br. 9) Petitioner does not take issue with the fact that the courts have held that various subjects of employee concern have, *under the facts of each case* been considered as "terms and conditions of employment", but Petitioner strongly doubts that Congress meant for the phrase "terms and conditions of employment" to be applied broadly whenever possible. Respondent Board again erroneously restates this position here despite the decision of the Court

*"Bd. Br." refers to the National Labor Relations Board's Brief. "R.T." references are to the transcript of testimony.

in the most recent case of *Westinghouse Electric Corporation v. NLRB,* 387 F.2d 542, 545-546 (C.A. 4, 1967), wherein the Court refutes this very contention made by Respondent:

> "The statutory phrase—'terms and conditions of employment'—according to the Board, is intended by Congress to be used in its 'broadest sense' and encompasses virtually everything which bears on the employment relationship and to which workers seek management's agreement. *However, the legislative history does not support the Board's view of congressional intent and design. At best, the history merely shows that Congress did not desire to enumerate specific bargaining subjects; it does not show that the phrase was meant to embrace every issue that might be of interest to unions or employers. To the contrary, as Mr. Justice Stewart stressed, in his concurring opinion in Fibreboard Paper Products Corp. v. N.L.R.B., 379 U.S. 203, 220-221, 223-224, 85 S.Ct. 398, 408-410, 13 L.Ed.2d 233 (1964):*
>
> *'It is important to note that the words of the statute are words of limitation.* The National Labor Relations Act does not say that the employer and employees are bound to confer upon any subject which interests either of them; the specification of wages, hours, and other terms and conditions of employment defines a limited category of issues subject to compulsory bargaining. The limiting purpose of the statute's language is made clear by the legislative history of the present Act. As originally passed, the Wagner Act contained no definition of the duty to bargain collectively. In the 1947 revision of the Act, the House bill contained a detailed but limited list of subjects of the duty to bargain, excluding all others. In conference the present language was substituted for the House's detailed specification. *While the language thus incorporated in the 1947 legislation as enacted is not so stringent as that contained in the House bill, it nonetheless adopts the same basic approach in seeking to define a limited class of bargainable issues.*

> *'The phrase 'conditions of employment is no doubt susceptible of diverse interpretations. At the extreme, the phrase could be construed to apply to any subject which is insisted upon as a prerequisite for continued employment. Such an interpretation, which would in effect place the compulsion of the Board behind any and all bargaining demands, would be contrary to the intent of Congress, as reflected in this legislative history."* (Emphasis supplied)

Therefore, in view of the express language of *Westinghouse Electric Corporation v. NLRB, supra,* unless the testimony and other evidence in the record show that the ownership and management *materially* affected the conditions of employment and that rental of the houses involved had a *substantial* effect upon the "terms and conditions of employment", then the increase of rent by the Petitioner cannot be considered a mandatory subject of bargaining. *Westinghouse Electric Corporation v. N.L.R.B.* (C.A.4, 1967) 387 F.2d 542, 547.

RESPONDENT'S ASSERTION THAT IN THE CIRCUMSTANCES OF THIS CASE RENTAL CHARGED EMPLOYEES IS A MANDATORY SUBJECT OF BARGAINING

The Respondent asserts that the rental of the company houses is a mandatory subject of bargaining since the company housing constitutes a substantial employment benefit for two reasons. The first alleged benefit is "the convenience of living adjacent to one's place of work—especially when the alternative is living from 25 to 40 miles away—." (Bd. Br. 11) The second is "the fact that rentals had not changed for 14 years clearly indicates that, prior to the unilateral increase, Silver Bell homes were renting below the prevailing rate." (Bd. Br. 11) It is obvious, after reviewing the entire record, that these were the only two possible

reasons Respondent could give that might be supported by any of the company housing cases. The Respondent relies solely on *NLRB v. Lehigh Portland Cement Co.,* 205 F.2d 821, 823 (C.A.4, 1953) in support of its position for the reason that the holding in *Lehigh* is based on *facts* which the Respondent claims exist in the instant case, but Respondent fails to point out where in the record these facts were established. Petitioner submits that they never were. At the beginning of the hearing before the Trial Examiner, the Trial Examiner asked the counsel for General Counsel if there would be any testimony to show whether or not the rentals paid by the tenants were comparable to the prevailing rentals of comparable property in the community and counsel stated that he had evidence to prove this. (R.T. 13) The evidence that counsel attempted to have admitted in order to prove that the rent charged for the company housing was lower than the prevailing rates for comparable housing in the community were: (1) portions of the classified advertisement sections from two editions of the *Arizona Daily Star,* a Tucson, Arizona, newspaper, which supposedly showed rental prices of homes in Tucson (R.T. 31-33), which evidence was rejected by the Trial Examiner as being hearsay (R.T. 33); and (2) testimony from Albert W. Avenetti regarding the difference in rental charges for a home in Tucson as compared to the rental charges for the company houses (R.T. 35), which testimony was rejected by the Trial Examiner for the reason that the witness was not competent to testify regarding comparable rental rates. (R.T. 39) Counsel for General Counsel had no other evidence to submit regarding the prevailing rental rates for comparable housing in the community, as is evident from his statement at the hearing. (R.T. 39, lines 8-16):

"TRIAL EXAMINER:

* * *

"Now let me say this: Is there anything further you want to get on the record as to what you propose to prove in addition to what you have already said, Mr. Harris, from this witness?

MR. HARRIS: From this witness?

TRIAL EXAMINER: With respect to comparable housing and the prevailing rate.

MR. HARRIS: No, there is nothing further except for the trial examiner's ruling. * * * *"

From this it is apparent that the General Counsel failed to prove that the company house rents were below the prevailing rates in the surrounding community or communities. For the Respondent to ask the Court to accept its inference as fact, in view of the above testimony, is improper. Without evidence supporting such a conclusion, no valid conclusion can be reached as to comparable rental values from the fact that Petitioner had not raised the rent for a 14 year period. (Bd. Br. 5)

The record is also void of testimony or other evidence that it was more "convenient" for the employees to live adjacent to their place of work rather than in one of the surrounding communities. Today the use of automobiles permits a person to travel greater distances to and from work. Many people have moved away from their places of employment, which are often, if not usually, located in areas incompatible with comfortable residential living, and drive several miles to and from work. This has, in fact, probably become the rule rather than the exception in this present day. Also, as counsel for the Petitioner pointed out at the hearing (R.T. 37) the convenience of living in Tucson, Arizona, where there are restaurants, theaters, public

transportation and recreational facilities, could easily outweigh any convenience that may be derived from living near the mine. Therefore, for the Respondent to assert generally that it is "more convenient" to live next to the mine, rather than in one of the surrounding communities (R.T. 11), without having any testimony or other evidence to support its position, certainly shows the true weakness of its case. Furthermore, if it was so much more "convenient" to live at the mine it is reasonable to conclude that there would be no vacancies in the two and three bedroom apartments. Such vacancies do exist however. (R.T. 19)

Having failed to prove either of these two factual bases for its conclusions that the rental of the company houses was a mandatory subject of collective bargaining, Respondent should not prevail here. It is the general rule, as stated in *NLRB v. Great Atlantic and Pacific Tea Company,* 346 F.2d 936, 939-940 (C.A.5, 1965) that:

> "When the General Counsel charges that an employer has committed an unfair labor practice, he must produce *substantial evidence* from which it may be inferred that a violation of the Act took place. Therefore, the burden of establishing a refusal to bargain in good faith rests initially with the General Counsel." (Emphasis supplied)

The burden of proof is on the one alleging violation of the statute to prove that unfair labor practices have been committed, *and it is not incumbent on the Respondent to disprove them! NLRB v. Brady Aviation,* 224 F.2d 23 (C.A. 5, 1955); 51A C.J.S. *Labor Relations* § 561.

Because the General Counsel has failed to prove its case with substantial evidence, this Court should not hesitate to set aside the Board's order, as was so stated in *Bilton Insulation, Inc. v. NLRB,* 303 F.2d 98, 103 (C.A.4, 1962):

> "The test of the substantiality of evidence in such cases is the same as in other cases; but it is also held that the reviewing function of the decisions of the Labor Board has been deposited with the Court of Appeals and that the Board's finding of fact must be supported by substantial evidence 'on the record considered as a whole' and that the reviewing court 'is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view'."

Petitioner submits that an examination of all of the company housing cases, including *NLRB v. Bemis Bro. Bag Co.,* 206 F.2d 33 (C.A.5, 1953); *NLRB v. Hart Cotton Mills, Inc.,* 190 F.2d 964 (C.A.4, 1953) and *Kohler Company,* 128 NLRB 1062, 300 F.2d 699, *cert. den.* 370 U.S. 911, can only lead to the conclusion reached by the Board and Trial Examiner in *Kohler Company, supra,* which was that company housing was not shown to be a term and condition of employment because (1) residence was not restricted to employees; (2) rents had not been shown to be below prevailing rates; and (3) there was no showing that other nearby facilities were not available, since the same facts exist in the case at bar.

CONCLUSION

Petitioner respectfully submits, for all the foregoing reasons, that the order of the Board should be set aside and made of no force and effect and that the Board be ordered to issue an order that:

A. Petitioner did not violate Sections 8(a)(5) and (1) of the Act, Sections 158(a)(5) and (1), Title 29, U.S.C.A.;

B. That the rental of company housing by Petitioner at the Silver Bell, Arizona, facility was not a mandatory subject of collective bargaining under Sections 8(a)(5) and 8(d) of the Act; Section 158(a)(5) and 8(d), Title 29, U.S.C.A.; and

C. That the rental of said housing does not constitute wages and/or other conditions of employment under Section 8(a)(5), 8(d) and 9(a) of the Act, Sections 158(a)(5), 158(d) and 159(a), Title 29, U.S.C.A., respectively.

Respectfully submitted,

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I certify that in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, 28 U.S.C.A., and that, in my opinion, the foregoing Reply Brief is in full compliance with those rules.

JOHN F. BOLAND, JR.